

Dinh (Migration) [2018] AATA 2680 (9 June 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Ms Vu Ngoc Mai Dinh

CASE NUMBER: 1618628

DIBP REFERENCE(S): BCC2016/2820683, CLF2012/178960, CLF2015/52917

MEMBER: K. Chapman

DATE: 9 June 2018

PLACE OF DECISION: Brisbane

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 09 June 2018 at 2:56pm

CATCHWORDS

Migration – Partner (Temporary)(Class UK) – Subclass 820 (Partner (Temporary)) – Genuine and continuing relationship – Non-exclusive relationship – Relationship dates between previous and current sponsor overlap – False and misleading information supplied to the Department – Delay in registering relationship with current sponsor – Limited evidence of shared life together – Evasive responses to Tribunal questions – Credibility issues – Decision under review affirmed

LEGISLATION

1. *Migration Act 1958 (Cth)*, ss 5CB, 5F, 65, 359, 359A, 359AA
Migration Regulations 1994 (Cth), rr 1.09A, 2.03A Schedule 2 cls 820.211, 820.221

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision of a delegate of the Minister for Immigration on 4 November 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* ('the Act').
3. The applicant, Ms Vu Ngoc Mai Dinh, applied for the visa on 24 August 2016 on the basis of the relationship with her sponsor, Ms Thi Yen Chi Dao (the 'current sponsor'). At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 ('the Regulations'). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that Ms Dinh did not satisfy cl.820.211(2) (a) at the time of the visa application. The delegate was not satisfied that Ms Dinh and Ms Dao were in a genuine and continuing de facto relationship as required by s.5CB of the Act. The delegate expressed concern regarding Ms Dinh's prior application for an onshore Partner visa sponsored a different sponsor, [Mr A] (who was previously known as [Ms A] at the time that application was lodged), which was withdrawn days before her application sponsored by Ms Dao was submitted. On 8 November 2016, Ms Dinh applied to the Tribunal for review of the visa refusal decision, providing a copy of that decision with her application.
5. On 11 January 2018, the Tribunal wrote to the applicant pursuant to sections 359A and 359(2) of the Act inviting her to comment on or respond to information contained in Departmental files and also to provide further information in support of her claims that she and the current sponsor were in a de facto relationship at the time of application. The aforementioned information in the Departmental files comprises a Statutory Declaration from the applicant of 27 August 2014 indicating she was in a genuine and continuing de facto relationship with [Mr A] (the 'previous sponsor'), a Site Visit Outcome Report from the Australian Border Force dated 23 November 2015 noting the applicant represented she was living with [Mr A] as at 17 November 2015, and Statutory Declarations from the applicant and current sponsor of 4 October 2016 in which they indicate they have been in a relationship since 2014 and moved in together following a July 2014 trip to Vietnam.
6. On 23 January 2018, the Tribunal received submissions and supporting material in response to the s.359A/359(2) invitation of 11 January 2018. In summary, this material contends that the applicant and the current sponsor have been in a genuine relationship since August 2014, despite the previous Partner visa application. The aforementioned material in response has been duly considered by the Tribunal. Further pre-hearing submissions and supporting material were also lodged by the applicant and they too have been duly considered by the Tribunal.
7. The applicant appeared before the Tribunal on 10 April 2018 to give evidence and present arguments. The Tribunal also took oral evidence in person from the current sponsor. The applicant changed representatives during the review hearing from Mr Jack Ta to Ms Rose Ta, both from Jack Ta & Associates. The Tribunal hearing was conducted with the assistance of two interpreters in the Vietnamese and English languages (the first not being able to extend their booking time), with the applicant and current sponsor both indicating they understood the interpreters. Both the applicant and the current sponsor confirmed to the Tribunal that they were feeling well prior to giving their oral evidence. At the review hearing,

the applicant submitted a Statutory Declaration from herself dated 9 April 2018 which has been duly considered by the Tribunal.

8. As will be described in further detail below, the Tribunal granted the applicant until 25 April 2018 to respond to information raised with her pursuant to s.359AA of the Act and also to provide any further written submissions or evidence. On 24 April 2018, the Tribunal received written submissions on behalf of the applicant from Mr Jack Ta (her previously nominated representative). The Tribunal has very carefully considered those submissions.
9. In order to provide further clarity to the present matter, the Tribunal notes that the initial registered migration agent on the record for the applicant was Mr Jack Ta of Jack Ta & Associates. As previously noted, he was replaced during the review hearing with Ms Rose Ta of the same firm. The registered migration agent initially on the record for the applicant with respect to her previous onshore Partner visa application was Ms Pamela Nhi Tieu of T Lawyers Pty Ltd, who was replaced by Mr Ta shortly before that visa application was withdrawn.
10. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

11. **BACKGROUND**

12. The applicant, Ms Vu Ngoc Mai Dinh, is a 35 year old national of Vietnam. She arrived in Australia as the holder of a Subclass 573 Student visa on 26 August 2008 with that visa having an expiry date of 30 August 2012. On 29 August 2012, Ms Dinh applied for an onshore Partner visa sponsored by [Ms A] (the 'previous sponsor'), an Australian citizen of Vietnamese origin. Their residential address for the purpose of that Partner visa application was [Address 1]. During the processing of that Partner visa application, [Ms A] underwent gender reassignment and adopted the name [Mr A] (the Tribunal accordingly hereafter refers to the previous sponsor as [Mr A]). Ms Dinh and [Mr A] registered their relationship with the Queensland authorities on 24 May 2012. Ms Dinh was granted a Subclass 820 temporary Partner visa on 29 April 2014 on the basis of the sponsorship of [Mr A].
13. On 17 November 2015, officers from the Australian Border Force conducted a site visit at [Address 1] during which both Ms Dinh and [Mr A] personally maintained they resided together at that address. On 25 May 2016, the Department wrote to Ms Dinh regarding adverse information received concerning her relationship with [Mr A]. On 27 May 2016, the Department received voluminous material by post from Ms Dinh supporting her contention that she remained in a genuine de facto relationship with [Mr A]. On 21 June 2016, Ms Pamela Nhi Tieu, then the representative for Ms Dinh, provided submissions contending that the relationship between Ms Dinh and [Mr A] was ongoing. A further Form 956 dated 28 June 2016 displayed Ms Dinh's residential address to be [Address 1] and Ms Tieu as her representative.
14. On 15 August 2016, Ms Dinh appointed Mr Jack Ta as her representative for the previous Partner visa application using a Form 956 which displayed her residential address as [Address 2] (another Form 956 dated 17 August 2016 also reflects these particulars). On 21 August 2016, Ms Dinh withdrew her previous Partner visa application sponsored by [Mr A]. On 24 August 2016, Ms Dinh lodged a new onshore Partner visa application sponsored by Ms Thi Yen Chi Dao (the 'current sponsor'), with Mr Jack Ta appointed as the representative for this application. This is the visa application currently before the Tribunal on review.
15. The sponsor of the current Partner visa application, Ms Dao, is a 43 year old Australian citizen of Vietnamese origin, who herself migrated to Australia sponsored on a Partner visa. With respect to the present Partner visa application, Ms Dinh and Ms Dao contend they have

been living together in a de facto relationship since returning to Australia from a July 2014 visit to Vietnam. They further contend that the relationship between Ms Dinh and [Mr A] had ceased by the time they purportedly commenced their own aforementioned cohabitation in 2014. Ms Dinh and Ms Dao registered their relationship with the Queensland authorities [in] March 2017.

ISSUES AND LAW

16. There is a two stage process for Partner visas. An applicant must first hold a provisional visa, enabling them to remain in Australia on a temporary basis, prior to the grant of a permanent visa. The grant of a permanent visa would generally depend on whether the relationship has continued for a period of at least two years. The issues in the present case are whether the applicant was at the time of the visa application, and remains at the time of the making of this decision, the de facto partner of the sponsor.

Whether the parties are in a spouse or de facto relationship

17. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the current sponsor who is an Australian citizen.

Are the parties in a de facto relationship?

18. 'De facto partner' is defined in s.5CB of the Act and provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2). In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.
19. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. These are: that the couple are both at least 18 years of age; and with limited exceptions, that the applicant has been in the de facto relationship for at least the period of 12 months ending immediately before the date of the application, unless he or she can establish compelling and compassionate circumstances for the grant of the visa. The requirement that the relationship existed for 12 months prior to the application does not apply in certain circumstances where the sponsor is or was a humanitarian visa holder, or for applications made on or after 9 November 2009, where the de facto relationship has been registered under a relevant State or Territory law: r.2.03(4), (5).

CONSIDERATION OF CLAIMS AND EVIDENCE

Are the other requirements for a de facto relationship met?

20. The Tribunal has paid regard to all of the evidence before it concerning the time of application and the time of decision. The Tribunal notes that material including, but not limited to, the visa application form, sponsorship form, Civil Partnership Certificate, photographs, social media records, items of correspondence, third party statements in support of the relationship, utility invoices and financial records were submitted in support of

the relationship between the applicant and the current sponsor. All relevant documentary material has been duly considered by the Tribunal.

21. Evidence of the applicant (Ms Dinh)

22. The oral evidence of the applicant may be summarised as follows. She outlined and confirmed her background details in the manner referred to above. The applicant indicated she had resided at [Address 3] from August 2014 (following return from a trip to Vietnam) until October 2015, after which she has lived continually at [Address 2]. She maintained that she lived with the current sponsor at both addresses during the aforementioned periods. The current sponsor's children, sister of the current sponsor and her children apparently also have lived together with the applicant in those residences. The applicant advised that she lived at [Address 1] from 2011 until August 2014 with the previous sponsor, [Mr A]. The Tribunal confirmed the aforementioned address history of the applicant with her on several occasions.
23. The applicant met the current sponsor in 2012 at a party held by the owner of the nail salon where they both worked. They became friends. At that time the current sponsor was in a relationship with a citizen of the United States, who fathered one of her children, and she was sponsoring him for a Partner visa. That relationship ended in 2013 and the visa sponsorship was withdrawn. In 2013, the applicant and the current sponsor travelled together to Thailand. One day earlier, the previous sponsor travelled to Thailand to undertake medical treatment in aid of gender reassignment from female to male. According to the applicant, the previous sponsor refused to maintain contact with her whilst in Thailand, even though she had travelled there in support. Apparently the previous sponsor had entered a relationship with another woman. This made the applicant upset and she obtained comfort from the current sponsor in Thailand. After around a week in Thailand, the applicant, current sponsor and the previous sponsor took the same flight to Vietnam where they all separated and stayed with their respective families (the previous sponsor was also recovering from the gender reassignment surgery at that time). The applicant and the current sponsor returned to Australia together and the previous sponsor followed around two months later. According to the applicant, she remained residing at [Address 1] with the previous sponsor at that time.
24. The applicant advised that her relationship with the previous sponsor became problematic on account of hormone injections affecting his personality. The current sponsor was also still in contact with the American father of her child but that relationship ultimately ended. The applicant and current sponsor apparently comforted each other. In July 2014, the current sponsor's father took ill and the applicant travelled with her to Vietnam. Following the death of the current sponsor's father, the relationship between her and the applicant grew closer. According to the applicant, by the end of this trip to Vietnam in August 2014 she was in a relationship with the current sponsor.
25. In August 2014, following their arrival back in Australia, the applicant and the sponsor apparently commenced co-habitation at [Address 3]. The previous sponsor apparently remained residing at [Address 1]. The applicant confirmed to the Tribunal that from August 2014 her relationship with the previous sponsor had concluded, although they remained friends. The previous sponsor apparently agreed to continue to support the previous Partner visa application for the benefit of the applicant. Although confirming that this prior relationship had concluded, the applicant advised she still provided assistance to the previous sponsor following the medical treatment for gender reassignment. The applicant contended she committed to a shared life with the current sponsor to the exclusion of all others from August 2014 and confirmed that this date was correctly provided in her current Partner visa application form with respect to the commencement, exclusivity and residential arrangements pertaining to that relationship.

26. When asked by the Tribunal to clarify the situation regarding withdrawal of her previous Partner visa application, the applicant advised it was withdrawn in September 2016 but maintained the actual relationship with the previous sponsor had concluded in 2014. The applicant contended that she did not advise the Department of this relationship breakdown because she still needed to care for the previous sponsor. The applicant 'didn't think' to notify the Department because of this alleged role in caring for the previous sponsor. The applicant advised she had maintained to the Department she was still in the relationship with the previous sponsor even though she was not.
27. The Tribunal drew to the attention of the applicant the pre-hearing correspondence issued pursuant to s.359A/s.359(2) of the Act dated 11 January 2018 and asked if she wished to add anything further to her written response. The applicant advised that all material in support of her current Partner visa application is genuine. She conceded it was wrong to not notify the Department of the previous relationship breakdown but cited compassionate circumstances which drew her to assist the previous sponsor at that time. Apparently by 2016 the circumstances of the previous sponsor had improved dramatically and the current sponsor wanted to be the sponsor for the applicant's Partner visa because their relationship was genuine. The applicant maintained she has built a family and a nail business with the current sponsor and that the relationship is genuine between them.
28. Pursuant to the provisions of s.359AA of the Act, the Tribunal raised with the applicant that Departmental file CLF2015/52917 at folios 257-259 contains a Statutory Declaration from her dated 27 August 2014 indicating she was living at [Address 1] with [Mr A]. Further, the Declaration indicates she went to Thailand holding a Bridging Visa B with [Mr A] stating (verbatim), *"On the last August, he had to go to Thailand for checking up his health after the sex change surgery on July 2013. At that moment, he thought he can go by himself because it was just few days but before the day he took that flight he felt very worry and want me to go with him. The morning after I went to the Immigration Office in Brisbane CBD to apply for a bridging visa so I can go to Thailand with him. He told me he was very happy because I always support him and understand him very well. That holiday was the most beautiful time with us. We had a lot of time together for relaxing and enjoying after the time he finished his health's check up. Until now we still remember every seconds we spent together that time."* The Tribunal advised that a Statutory Declaration from [Mr A] dated 14 September 2014 is also contained in that Departmental file and states similar information.
29. The Tribunal further raised with the applicant that Departmental file BCC2016/2820683 at folios 45-48 contains a Statutory Declaration from her dated 4 October 2016 stating (verbatim), *"In July 2013, my ex-partner and I went to Thailand, he came to Thailand first because I could not get my visa done on time; Chi also went to Thailand with me. He went to Thailand quite often because the process of transgender surgery from woman to man was still underway. After one week in Thailand, I could not contact him at all, I had tried for few days but he did not pickup my phone call or text. Then I found out He went to Vietnam with someone else. From that moment, I knew our relationship was not like before..."* The Tribunal also advised the applicant that Departmental Movement records show she was outside Australia between 3 July and 25 July 2013 as the holder of a Bridging Visa B.
30. The Tribunal indicated that the above information is relevant as it tends to suggest that inconsistent information was provided to the Department concerning her current and previous Partner visa applications and this casts doubt on her and the current sponsor's credibility and the genuineness of the relationship with her. The Tribunal indicated that if it were to rely upon the s.359AA information then it would be the reason or part of the reason to affirm the decision under review. The review applicant confirmed that she understood why the information is relevant to the review. The review applicant was offered an adjournment before commenting on or responding to this information. She requested more time to provide a written response after the review hearing. The Tribunal granted her until 25 April 2018 to

provide a response, which was duly received and considered (and is described in further detail below).

31. Pursuant to the provisions of s.359AA of the Act, the Tribunal raised with the applicant that Departmental file CLF2012/178960 at folios 115-117 contains a Form 956 'Advice by a migration agent/exempt person of providing immigration assistance' which is signed by both her and registered migration agent Ms Pamela Nhi Tieu (MARN 0741944 of T Lawyers Pty Ltd) on 21 August 2012 in respect of her Partner visa application sponsored by [Mr C]. Her address is listed as [Address 1]. Further, Departmental file CLF2015/52917 at folios 319-325 contains written submissions from Ms Tieu of T Lawyers dated 21 June 2016 indicating the applicant instructed her to provide a response to a letter from the Department dated 25 May 2016 regarding adverse information concerning the applicant's relationship with [Mr A]. These submissions maintain that the applicant and [Mr A] remained in a relationship together at that time (21 June 2016). Additionally, Departmental file CLF2015/52917 at folios 328-330 contains another Form 956 signed by Ms Tieu and the applicant on 28 June 2016 where the latter's address is listed as [Address 1].
32. The Tribunal indicated that the above information is relevant as it tends to suggest that inconsistent information was provided to the Department and the Tribunal concerning her current and previous Partner visa applications and this casts doubt on her and the current sponsor's credibility and the genuineness of the relationship with her. The Tribunal indicated that if it were to rely upon the s.359AA information then it would be the reason or part of the reason to affirm the decision under review. The review applicant confirmed that she understood why the information is relevant to the review. The review applicant was offered an adjournment before commenting on or responding to this information. She requested more time to provide a written response after the review hearing. The Tribunal granted her until 25 April 2018 to provide a response, which was duly received and considered (and is described in further detail below).
33. Pursuant to the provisions of s.359AA of the Act, the Tribunal raised with the applicant that Departmental file CLF2015/52917 at folios 336-337 contains a Form 956 signed by her and registered migration agent Mr Jack Ta (MARN 0212473) on 15 August 2016 where the applicant's address is listed as [Address 2]. Folio 342 of that file contains a withdrawal form signed by the applicant on 21 August 2016 in respect of her Partner visa application sponsored by [Mr A] which was submitted to the Department by Mr Jack Ta on 22 August 2016, two days before the applicant lodged her new application for a Partner visa sponsored by the current sponsor (Ms Dao). Further, Departmental file BCC2016/2820683 at folios 4-6 contains a Form 956 with respect to the current Partner visa application sponsored by Ms Dao which was signed by Mr Jack Ta on 23 August 2016 and by the applicant on 17 August 2016, four days before she signed the form withdrawing her Partner visa application sponsored by [Mr A] (the previous sponsor).
34. The Tribunal indicated that the above information is relevant as it tends to suggest that inconsistent information was provided to the Department and the Tribunal concerning her current and previous Partner visa applications and this casts doubt on her and the current sponsor's credibility and the genuineness of the relationship with her. The Tribunal indicated that if it were to rely upon the s.359AA information then it would be the reason or part of the reason to affirm the decision under review. The review applicant confirmed that she understood why the information is relevant to the review. The review applicant was offered an adjournment before commenting on or responding to this information. She requested more time to provide a written response after the review hearing. The Tribunal granted her until 25 April 2018 to provide a response, which was duly received and considered (and is described in further detail below).

35. Pursuant to the provisions of s.359AA of the Act, the Tribunal raised with the applicant that Departmental file CLF2015/52917 at folio 326 contains an envelope received by the Department on 27 May 2016. According to the information on the envelope, it was sent by the applicant and her address is recorded as [Address 1]. The envelope contains various documents in support of the applicant continuing to be in a relationship with [Mr A] at that time. For example, the envelope includes a copy of an Asteron Life insurance policy last updated 22 May 16 showing the applicant's mailing address as [Address 1] and also [Mr A] as being in a de facto relationship with her and being the 100% nominated beneficiary of the insurance policy. Further, statements from a Commonwealth Bank joint account between the applicant and [Mr A] displaying transactions from 1 January 2016 to 24 May 2016 were submitted by the applicant in that envelope.
36. The Tribunal indicated that the above information is relevant as it tends to suggest that inconsistent information was provided to the Department and the Tribunal concerning her current and previous Partner visa applications and this casts doubt on her and the current sponsor's credibility and the genuineness of the relationship with her. The Tribunal indicated that if it were to rely upon the s.359AA information then it would be the reason or part of the reason to affirm the decision under review. The review applicant confirmed that she understood why the information is relevant to the review. The review applicant was offered an adjournment before commenting on or responding to this information. She requested more time to provide a written response after the review hearing. The Tribunal granted her until 25 April 2018 to provide a response, which was duly received and considered (and is described in further detail below).
37. Following the raising of the s.359AA information, in response to questions from the Tribunal the applicant denied that anyone suggested to her to submit conflicting evidence regarding her purported relationships with the previous and current sponsors. She maintained that it was her idea to do so. The Tribunal raised with the applicant that her recent Statutory Declaration of 9 April 2018 at paragraph thirteen provides an address history inconsistent with information she had previously submitted to the Department (that is that she has lived at [Address 3] from July 2014 until October 2015 when she moved to [Address 2]). The applicant initially indicated she preferred to respond in writing, then stated she felt unwell, and then confirmed she did not suffer from a medical condition. She then indicated she would answer the Tribunal's question and agreed that the recent information was inconsistent with prior information but contended the earlier information was provided as the previous sponsor wanted to assist her prior visa application. When asked by the Tribunal if the previous sponsor ([Mr A]) had provided false information to the Department, the applicant responded, "*I don't know*". The applicant then indicated it was she who provided all of the information to her previous registered migration agent for the previous Partner visa application. The applicant also added that the current sponsor (Ms Dao) was aware of the continuation of the previous Partner visa application. Overall, the demeanour of the applicant was evasive, and she answered questions in a defensive manner, with respect to her oral evidence concerning responsibility for the provision of false and misleading information to the Department.
38. Following an adjournment, the Tribunal invited the applicant to provide oral evidence concerning the financial aspects of the current relationship. She indicated that she opened a joint bank account with the current sponsor after the time of application. Prior to that they apparently shared funds from their own individual accounts. She contributes to rent, utilities and food at the current residence. The applicant and current sponsor purchased a vehicle and a nail salon together after the time of application. They do not have a joint credit card. The Tribunal indicated that there appeared to be limited evidence at the time of application in support of the financial aspects of the relationship with the current sponsor, inviting the applicant's comment. The applicant replied that they officially started sharing their finances at the time of application and that her relationship with the previous sponsor ended in 2014

but she still took care of him. The applicant added that she and the current sponsor contribute half each now in living costs.

39. The Tribunal invited the applicant to provide oral evidence concerning the nature of the household pertaining to the current relationship. She indicated that she, the current sponsor and the current sponsor's sister assist with various duties in the house and with the children of the latter two women. The applicant advised that she performs cooking, cleaning and helps the children with matters such as homework. The Tribunal indicated that there appeared to be limited evidence at the time of application in support of the nature of the household with the current sponsor, inviting the applicant's comment. The applicant replied that once the previous Partner visa application had been withdrawn, and the current one lodged, they 'had more time to concentrate on providing more evidence.'
40. The Tribunal invited the applicant to provide oral evidence concerning the social aspects of the current relationship. She indicated that they have friends over for dinner at [Address 2], go to friend's houses and everyone on the street recognises them as a couple. They have met each other's friends and relatives. The Tribunal invited the applicant to provide oral evidence concerning the nature of the persons' commitment to each other regarding the current relationship. She indicated they have been in a relationship with each other since August 2014, 'officially' lived together since that time, draw companionship and emotional support from each other (particularly with regard to the current sponsor's children and their past poor relationships) and they see the relationship as long term. The applicant and current sponsor did not register their current relationship with the Queensland authorities until [March] 2017 because the previous registration of the relationship between the applicant and previous sponsor had to be formally withdrawn. The applicant agreed that registration of her relationship with the current sponsor was partly to assist with the current Partner visa application but also so they could have community recognition.
41. The Tribunal indicated that there appeared to be limited evidence at the time of application in support of the nature of the persons' commitment to each other with the current sponsor, inviting the applicant's comment. The applicant replied that at the time of application she had 'lingering' feelings for the previous sponsor. She stated, *"I have to admit that I'm not fully committed to the current sponsor when visa application lodged."* When asked by the Tribunal why she lodged the current visa application, the applicant responded that when she decided the prior relationship was finished she wanted to lodge the new application. The applicant then clarified that she was committed to the current sponsor from 2014 but was still tied to the previous sponsor so she was 'not fully committed' between 2014 and 2016. The applicant asked the Tribunal to focus on the evidence after lodgement of the current Partner visa application.

42. *Evidence of the current sponsor (Ms Dao)*

43. The evidence of the current sponsor may be summarised as follows. She came to live in Australia after being sponsored through a Partner visa herself. She provided an address, travel and relationship history consistent with the oral evidence of the applicant. The current sponsor confirmed their relationship commenced in August 2014 and that they had resided together since that time. She denied that the applicant had ever resided with the previous sponsor after August 2014. She advised the applicant assisted the previous sponsor between 2014 and 2016 with the transgender reassignment process and that is why the previous Partner visa application was maintained. The current sponsor denied that either she or the applicant had ever provided false, misleading or untruthful evidence to the Department. When asked by the Tribunal if she was aware that as recently as May 2016 information was sent to the Department suggesting the applicant and previous sponsor remained in a relationship, the current sponsor displayed an evasive demeanour and initially

refused to provide a direct answer. She eventually remarked that the relationship between the applicant and the previous sponsor 'was just on paper work.'

44. The current sponsor denied having any involvement with the previous Partner visa application. When the site visit by officers from the Australian Border Force was raised with her, she indicated that the applicant left items at the residence of the previous sponsor. The Tribunal again asked the current sponsor of her awareness of the applicant maintaining the genuineness of her relationship with the previous sponsor to the Department and she again adopted an evasive demeanour and denied any involvement. She indicated the prior relationship was just on the paper work and that people in the community know their relationship to have been genuine since 2014.
45. The current sponsor gave oral evidence broadly consistent with the applicant regarding the financial and social aspects of their relationship and the nature of the parties' household and their commitment to each other. At the conclusion of the current sponsor's evidence, the applicant advised that the evidence of the former was truthful. Her representative, Ms Rose Ta, requested the opportunity to provide written submissions after the review hearing. The applicant was granted until 25 April 2018 for this purpose.

46. *Material received following the review hearing*

47. On 24 April 2018, the Tribunal received a written submission via email sent by the applicant's previous representative, Mr Jack Ta. This submission may be summarised as follows. It is contended that the applicant and the previous sponsor 'maintained a good relationship and continued as a couple' even after the purported relationship between the applicant and the current sponsor commenced in August 2014. Essentially the submissions contend there was 'overlap' between the two relationships and that no adverse inferences should be drawn from this. In particular the submission contends that cultural taboos regarding gender reassignment and same sex relationships make the circumstances more complicated, account for a degree of secrecy and point to there being no dishonesty in the current matter. The submission asserts that the relationship between the applicant and the current sponsor is genuine and continuing. The Tribunal has very carefully considered the aforementioned submission.

48. *Credibility Concerns*

49. As outlined above, the applicant maintained to the Department over several years that she was in a genuine de facto relationship with the previous sponsor ([Mr A]). The applicant did so as recently as June 2016 by way of written submissions and Form 956 entries. She also submitted a large volume of documentary evidence to the Department in support of that contention in May 2016. The applicant was personally present during a site visit in November 2015 conducted by officers from the Australian Border Force and advised them she was still cohabitating with the previous sponsor at that time. In maintaining the purported genuineness of the relationship with the previous sponsor, then contending she was in a relationship with the current sponsor (Ms Dao) from August 2014, the applicant submitted diametrically opposed Statutory Declarations as previously outlined. The evasive demeanour displayed by both the applicant and the current sponsor when providing portions of their oral evidence was also apparent to the Tribunal.
50. Having carefully considered the above matters, the Tribunal has formed the view that the applicant is an untrustworthy and unreliable witness with respect to migration matters. She has displayed a disregard for Australia's migration laws and demonstrated a willingness to tenaciously pursue any visa option which serves her own interests. Further, she has provided false information in documentation provided to Commonwealth officials, including the Statutory Declarations previously referred to. She has been assisted in her endeavours

by both the current and previous sponsors who have themselves shown disregard for the migration laws in this country.

51. Whilst the Tribunal accepts that individuals may hold the sexual preference or gender identity with which they are most comfortable, and that such preferences or identities may be fluid, it does not accept that in the present matter such issues account for the conduct of the applicant with respect to her migration status (as was submitted). Rather, the Tribunal forms the view that submissions advanced on behalf of the applicant seeking to explain her conduct through reliance upon the lenses of sexual preference and gender identity have been cynically employed. Of note neither the applicant, nor the current sponsor, in their oral evidence made suggestions that they were forced to conceal their purported relationship due to cultural or societal taboos. Rather, they contend that their own same sex relationship was well known throughout their community. Accordingly, the Tribunal does not accept that the applicant's sexual preference (or that of either of her sponsors), or the previous sponsor's gender reassignment, explains or excuses the deceitful course of conduct pursued by the applicant in attempting to obtain Australian permanent residence. Following careful consideration of the documentary and oral evidence, the Tribunal finds that the applicant and current sponsor are not witnesses of credit.

52. *Circumstances of the relationship*

53. The Tribunal has considered all of the circumstances of the relationship, including the following matters, in arriving at its decision concerning the existence of a de facto relationship between the applicant and the current sponsor.

54. *Financial aspects of the relationship*

55. The Tribunal had before it documentary evidence pertaining to the financial aspects of the relationship including, but not limited to, utility accounts, financial records and consumer receipts. The Tribunal has paid due regard to such documentation. Further, the Tribunal has duly considered the oral evidence of the applicant and the current sponsor. Due to the reasons outlined above, the Tribunal finds that both the applicant and the current sponsor are unreliable witnesses who have fabricated evidence in furtherance of attempting to legitimise their sham and false relationship for the purpose of securing a migration outcome for the former. Therefore, the Tribunal finds that the evidence submitted in support of the financial aspects of the relationship is of a contrived nature and accordingly it is afforded very low weight. For completeness, the Tribunal finds that at the time of application there was no joint ownership of real estate or other major assets, no joint liabilities, limited pooling of financial resources (and none with respect to major financial commitments), no legal obligations were owed between the parties, and there was no sharing of day to day household expenses (as the Tribunal does not accept the parties were cohabitating as detailed below).

56. *Nature of the Household*

57. The Tribunal had before it documentary evidence pertaining to the nature of the household including, but not limited to, items of mail addressed to the applicant and the current sponsor, invoices and consumer receipts. The Tribunal has paid due regard to such documentation. Further, the Tribunal has duly considered the oral evidence of the applicant and the current sponsor with respect to the nature of the household. Due to the reasons outlined above, the Tribunal finds that both the applicant and the current sponsor are unreliable witnesses who have fabricated evidence in furtherance of attempting to legitimise their sham and false relationship for the purpose of securing a migration outcome for the former. Therefore, the Tribunal finds that the evidence submitted in support of the nature of the household is of a contrived nature and accordingly it is afforded very low weight. The

Tribunal does not therefore accept that the applicant and the current sponsor were cohabitating at the time of application. For completeness, the Tribunal finds that at the time of application there is minimal evidence of joint responsibility for the care and support of children, no persuasive evidence of living arrangements by way of cohabitation, and no persuasive evidence of the sharing of responsibility for housework.

58. *Social aspects of the relationship*

59. The Tribunal had before it documentary evidence pertaining to the social aspects of the relationship including, but not limited to, photographs, statements and social media records. The Tribunal has paid due regard to such documentation. Further, the Tribunal has duly considered the oral evidence of the applicant and the current sponsor with respect to the social aspects of the relationship. Due to the reasons outlined above, the Tribunal finds that both the applicant and the current sponsor are unreliable witnesses who have fabricated evidence in furtherance of attempting to legitimise their sham and false relationship for the purpose of securing a migration outcome for the former. Therefore, the Tribunal finds that the evidence submitted in support of the social aspects of the relationship is of a contrived nature and accordingly it is afforded very low weight. For completeness, the Tribunal finds that at the time of application there is some evidence that the parties represent themselves to other people as being in a de facto relationship, there is some evidence of family, friends and acquaintances recognising the parties as in a de facto relationship, and there is some evidence that the parties have undertaken joint social activities. However, higher weight is afforded to the contrary evidence suggestive of the parties not being in a genuine de facto relationship at the time of application due to the serious credibility issues identified.

60. *Nature of the persons' commitment to each other*

61. The Tribunal had before it documentary evidence pertaining to the nature of the persons' commitment to each other including, but not limited to, social media records, statements and consumer receipts. The Tribunal has paid due regard to such documentation. Further, the Tribunal has duly considered the oral evidence of the applicant and the current sponsor with respect to the nature of the persons' commitment to each other. Due to the reasons outlined above, the Tribunal finds that both the applicant and the current sponsor are unreliable witnesses who have fabricated evidence in furtherance of attempting to legitimise their sham and false relationship for the purpose of securing a migration outcome for the former. Therefore, the Tribunal finds that the evidence submitted in support of the nature of the persons' commitment to each other is of a contrived nature and accordingly it is afforded very low weight.
62. For completeness, the Tribunal finds that at the time of application there is no persuasive evidence that the parties have been in a de facto relationship since August 2014, there is no persuasive evidence that they were cohabitating at the time of application, there is some evidence that they drew some degree of companionship and emotional support from each other, and there is no persuasive evidence that they saw the relationship as a long term one. The Tribunal notes that the applicant stated at one point in her oral evidence, *"I have to admit that I'm not fully committed to the current sponsor when visa application lodged."* This is inconsistent with the applicant and current sponsor having a high degree of commitment to each other at the time of application or having had a mutual commitment to a shared life to the exclusion of all others at that time. Higher weight is afforded to the evidence suggestive of the parties not being in a genuine de facto relationship at the time of application, as opposed to that submitted by the applicant, due to the serious credibility issues identified.

63. *Conclusion concerning a de facto relationship*

64. Following careful consideration of the documentary and oral evidence, the Tribunal considers that the purported de facto relationship between the applicant and the current sponsor is a sham and a false relationship designed to secure a migration outcome for the former. For reasons previously expressed, the Tribunal finds the applicant and the current sponsor to be unreliable witnesses. On balance, the Tribunal does not accept that the applicant was in a genuine de facto relationship with the current sponsor at the time of application due to the serious credibility concerns identified. Nor does the Tribunal accept that there is persuasive evidence following the time of application which points to the relationship between the applicant and the current sponsor being genuine at the time the current Partner visa application was lodged.
65. Having regard to the above matters, the Tribunal accepts that the applicant is not related by family to the current sponsor and that they are both over 18 years of age. However, the Tribunal is not satisfied that the applicant and the current sponsor were living together (or did not live separately and apart on a permanent basis), had a mutual commitment to a shared life to the exclusion of all others, or that the relationship between them was genuine and continuing, at the time of the visa application. The Tribunal is therefore not satisfied that the requirements of s.5CB(2)(a), (b) and (c) of the Act were met at the time of the visa application.
66. Given these findings, the Tribunal is not satisfied that at the time the visa application was made Ms Dinh and Ms Dao were in a de facto relationship as defined in the Act. Therefore Ms Dinh does not meet the requirements of cl.820.211(2)(a). Clause 820.221 requires the applicant to continue to satisfy the clause 820.211 criteria at the time of decision, unless the relationship has ceased and certain circumstances exist (concerning death of the sponsor, family violence and parental responsibilities). No evidence of such circumstances is before the Tribunal. It follows that Ms Dinh does not satisfy the requirements of cl.820.221. Accordingly, it is unnecessary for the Tribunal to make findings in relation to the requirements of r.2.03A.
67. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

68. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

K. Chapman
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).